Supreme Court, U.S.
FILED

No. _____ 99 789 NOV 20 1999

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

RUFINO MARTINEZ,
Petitioner
v.
UNITED STATES OF AMERICA,
Appellee

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 1999

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QUESTION PRESENTED

Whether the government's refusal to interview Petitioner for more than six months after the initial meeting was indefensible and in bad faith, violating the spirit and letter of Wade v. United States, 504 U.S. 181 (1992), thereby breaching the plea bargain.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was simply a one page order, dated July 22, 1999, granting Appellee's motion to dismiss appeal. A copy of same is attached as Appendix A.

STATEMENT OF JURISDICTION

This petition is due on or before October 20, 1999. This Court has jurisdiction pursuant to 28 U.S.C §1257.

CONSTITUTIONAL PROVISION INVOLVED

Whether the governments' refusal to make a § 5k1.1 departure motion was irrational or withheld in bad faith. *Santobello v. New York*, 404 U.S. 257 (1971).

STATEMENT OF THE CASE

On May 7, 1998, Martinez, hereafter "Petitioner," entered a plea of guilty to count 1 of the indictment, conspiracy to possess with intent to distribute 5 kilograms or more of cocaine in violation of Title 21, U.S.C. § 846. (RI: 84, R2: 26). After execution of the plea documents and colloquy, the District Court found Appellant guilty. (R2: 27). As part of the plea agreement with the government, Petitioner waived his right to appeal directing or collaterally excepting (1) any sentence above the statutory maximum or (2) an upward

departure from the USSG not requested by the United States. (RI: 82; R2: 19). As part of its agreement with Petitioner, the government agreed to file a § 5K1.1 motion if the Petitioner provided substantial assistance; however, the government retained sole discretion in this respect. (RI: 82; R2: 6).

Petitioner was debriefed on May 5, 1998, by DEA Agents Turnbull and Cook, in the presence of Mr. Balboni, Assistant U.S. Attorney in charge of this case, Mr. Farrow, Appellant's interpreter, and your undersigned. (R3: 4, 12). An agreement was reached that they, meaning Turnbull and Cook, would get back with Appellant to see what kind of "further" information he could give them that might warrant a departure motion. (R3: 12). The agents did not find the time for further debriefing until November 12, 1998, more than 6-months after the initial interview. (R3: 12-13). Additionally, on May 5, 1998, the agents claimed they would check Petitioner out of the Harris County Jail (Houston, Texas), put him in a van with tinted windows, and take him to the location to which he was referring in the May 5 discussion. This was never done because permission to remove him from jail was never sought from the DOJ. (R3: 20). The government asserted that what Appellant told them on May 5 was already known by agents. (R3: 16-17). On November 12,1998, Petitioner apparently debriefed again with Turnbull or Cook or both.

According to the government, what he provided was well known in law enforcement. (R3: 17). On an uncertain date, Petitioner discussed the whereabouts of certain fugitives with a division of the Harris County Sheriff's Department. According to the government, he could not provide specific information as to how he could find these individuals.

On December 16, 1998, upon learning that the government did not intend to file a § 5k1.1 motion, Appellant filed a motion objecting to the government's unwillingness to request a downward departure. (RI: 112).

On December 17, 1998, Appellant was sentenced to 188 months, the low end of the guidelines, because that was part of the plea agreement. (R3: 23-24).

Petitioner subpoenaed DEA Agent Turnbull and her notes of the May 5 interview and attempted to call her as a witness or introduce her notes or both at sentencing. The District Court would not allow it. An effort to admit the notes and seal them for an appellate court's review was likewise denied. (R3: 19-22).

REASONS FOR GRANTING THE WRIT

Wade v. United States, 504 U.S. 181, 186 (1992), suggested in dicta that defendants are

entitled to attack a prosecutor's refusal to make a § 5k1.1 departure motion as irrational or withheld in bad faith.

In *United States v. Isaac*, 141 F.3d 477 (3rd Cir. 1998), the Court believed the *Wade* holding was confined to situations in which there is no plea bargain agreement. Id. at 482. Thus, when a plea bargain is involved the obligations of the parties are contractual in nature and therefore "the district courts must be able to review the parties' performance under the terms of the provisions of the plea agreement" to make certain the government exercises 'good faith' in carrying out its obligations under the contract. Id. The *Isaac* Court relied heavily on the Second Circuit's holdings in *United States v. Rexach*, 896 F.2d 710 (2nd Cir. 1990) and *United States v. Knights*, 968 F.2d 1483 (2nd Cir. 1993).

In *United States v. Solis*, ___ F.3d ___ (5th Cir. 1999, decided March 8, 1999, No. 97-20273), that Court, citing *United States v. Abhouran*, 161 F.3d at 212, disagreed with the passage of that opinion that held, even when the government retains "sole discretion" over whether to offer a § 5k1.1 motion, district courts may depart in cases where the government refuses to file the motion in bad faith, n.3, citing *United States v. Price*, 95 F.3d at 368 (5th Cir. 1996)(refusal to file a § 5k1.1 motion where government retains sole discretion in plea

agreement is reviewable only for an unconstitutional motive). There was, however, no allegation of bad faith in *Price*.

Appellant was debriefed on May 5, 1998, assured that agents would soon check him out of jail, position him in a van with tinted windows, and take him to the drug trafficking location or locations he mentioned. This was never done because permission to remove Appellant from jail was never sought from the DOJ or, alternatively, DEA Agents were to busy, or the government forgot. (R3: 20, 17). The government also suggested that counsel did not make anyone aware Petitioner had not been interviewed again after May 5. (R3: 17). That is not accurate. After speaking with Agent Cook on August 6, counsel filed an unopposed motion to continue the sentencing because DEA Agent Cook had been too busy to talk to Petitioner since May 5, 1998. (RI: 101).

The government then asserted what Petitioner told them on May 5 was already known by agents. (R3: 16-17). Assuming this were accurate, it would have been unnecessary for agents to assure him and others present they would check him out of jail and put him in a van with tinted windows for the purpose of verifying his May 5 debriefing information.

On November 12, 1998, Petitioner apparently debriefed again with Turnbull or Cook or both.

According to the government, what he provided was well known to law enforcement. (R3: 17). On an uncertain date, he discussed the whereabouts of certain fugitives with a division of the Harris County Sheriff's Department. According to the government, he could not provide specific information as to how these individuals could be located.

Petitioner subpoenaed DEA Agent Turnbull and her notes of the May 5 interview and attempted to call her as a witness or introduce her notes or both at sentencing. The District Court would not allow it. An effort to admit the notes and seal them for an appellate court's review was likewise denied. (R3: 19-22).

The government breached its plea bargain because the record shows Petitioner was ready and willing to perform his part, or stood ready to perform, but was unable to do so because the government apparently was too busy to timely interview him, i.e., perform its end of the bargain by allowing him the opportunity to comply, for more than 6-months. *United States v. Melton & Roger*, 930 F.2d 1096, 1098 (5th Cir. 1991). *Melton* does not appear to have a sole discretion clause in the plea agreement.

Petitioner requests that the Court review this claim under contract law to determine whether the government breached its plea agreement with him.

United States v. Harpaul, 4 F.Supp. 137 (E.D.N.Y. 1998), *United States v. Khan*, 920 F.2d 1100, 1105 (2nd Cir. 1990)("cooperation agreements, like plea bargains, may usefully be interpreted with principles borrowed from the law of contract"), *cert. denied*, 449 U.S. 969 (1991); *United States v. Rexach*, supra; *United States v. Isaac*, supra; *United States v. Knights*, supra; *Santobello v. New York*, 404 U.S. 257 (1971). Additionally, Petitioner requests that the Court vacate his sentence and remand with instructions to the District Court to hold a full and fair hearing. See *United States v. Hernandez*, 17 F.3d 78, 80-81 (5th Cir. 1994); *United States v. Valencia*, 985 F.2d 758 (5th Cir. 1993).

CONCLUSION

The government cannot rely upon the sentencing appeal waiver because it breached the plea agreement with Petitioner by failing to verify any information from the May 5, 1998, interview with Petitioner, and did not reinterveiw him for more than six months; consequently, it abandoned the right to enforce the waiver.

Petitioner requests a full and fair hearing or specific performance.

Respectfully submitted,

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October 1999

APPENDIX A

Filed July 22, 1999.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

V.

RUFINO MARTINEZ, Defendant-Appellant.

Appeal from the United States Court of Appeals for the Fifth Circuit.

Before Davis, Benavides, and Parker, Circuit Judges.

By the Court:

It is ordered that the motion of Appellee to dismiss the appeal is granted.

It is further ordered that Appellee's alternative request for an extension of fourteen (14) days from the date of this order to file their brief is denied as moot.